

THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CAMERON PIERCE and PATRICIA PIERCE,
husband and wife; KAREN KIRBY, a single
woman; GREGORY SHERMAN and PAULA
SHERMAN, husband and wife; MICHAEL
LePAGE and GERTRUDE LePAGE, husband
and wife; LARRY BROWN, a single man; and
RALPH MARTINELLI, a single man on behalf
of themselves and a class of similarly situated
individuals,

Plaintiffs

vs.

NOVASTAR MORTGAGE, INC, a foreign
corporation,

Defendant.

NO. C05-5835 RJB

DEFENDANT NOVASTAR
MORTGAGE'S OPPOSITION TO
PLAINTIFFS' MOTION IN LIMINE

NOTED: June 8, 2007

Defendant NovaStar Mortgage, Inc. ("NovaStar"), by counsel, respectfully submits
this Opposition to plaintiffs' motion in limine to admit certain exhibits.

I. BACKGROUND

The plaintiffs have filed a motion in limine seeking to pre-admit 102 exhibits
consisting of several hundred pages of documents. Most of these exhibits were included in

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LAW OFFICES
GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM, LLP
1201 PACIFIC AVENUE, SUITE 2100
POST OFFICE BOX 1157
TACOMA, WASHINGTON 98401-1157
(253) 620-6500 • FACSIMILE (253) 620-6565

1 the initial Pretrial Order filed by the parties on March 26, 2007. (Dkt. 139). For all but a few
 2 of the exhibits, NovaStar stipulated to authenticity but declined to agree to admissibility. In
 3 the Pretrial Order NovaStar did stipulate to both the authenticity and admissibility of exhibits
 4 that clearly were relevant and admissible. For ease of reference, attached as an appendix to
 5 this memorandum are the identified exhibits excerpted from the Pretrial Order grouped into
 6 the four categories identified in plaintiffs' motion.
 7

8 The plaintiffs' motion should be summarily rejected. The motion has three
 9 insurmountable problems. First, the motion is extremely untimely, filed two months after the
 10 Court's deadline for motions in limine. Second, contrary to this Court's admonition in the
 11 pretrial conference, the plaintiffs simply are attempting to "dump" a large amount of exhibits
 12 – some consisting of complete files with dozens of documents – into evidence without
 13 attempting to streamline the materials presented to the jury. Third, many of the documents
 14 have questionable relevance, and the plaintiffs have not even attempted to lay a foundation for
 15 admissibility or explain how these exhibits fit into their trial presentation.
 16

17 II. ARGUMENT

18 A. **THE PLAINTIFFS' MOTION SHOULD BE DISREGARDED BECAUSE IT** 19 **WAS FILED LONG AFTER THE COURT'S DEADLINES FOR MOTIONS IN** 20 **LIMINE.**

21 On November 13, 2006 the Court issued a revised scheduling order providing that all
 22 motions in limine be filed by March 22, 2007, one month before the originally scheduled trial
 23 date of April 23, 2007. Subsequently, the Court issued an order changing the trial date to
 24 June 11, 2007 and providing new deadlines for other motions. (Dkt. 184). However, the
 25 motion in limine deadline was **not** extended.
 26

1 Ignoring the Court's scheduling order, the plaintiffs filed this motion on May 24,
 2 2007, over two months after the motion in limine deadline passed and less than three weeks
 3 before trial. The deadline for motions in limine is established for a purpose – to allow the
 4 parties to work through the admissibility of exhibits long before trial. The plaintiffs have
 5 known for two months that NovaStar was not agreeing to the admissibility of these
 6 documents. It would be unfair and prejudicial to now allow the plaintiffs to proceed with this
 7 motion in limine on the eve of trial.
 8

9 **B. THE PLAINTIFFS' ATTEMPT TO INUNDATE THE JURY WITH**
 10 **DOCUMENTS SHOULD BE PREVENTED.**

11 At the pre-trial conference this Court admonished the parties to take care in limiting
 12 the amount of exhibits to be submitted to the jury. The Court stated:

13 . . . I would hope that you could cut down on your witnesses and exhibits. I
 14 understand that that is a shifting issue and -- but what I would ask is that you
 15 eliminate witnesses that you know you won't call on both sides, and I you
 16 already specified ones that you will call and ones that you may call, and do
 17 your best to keep that ---- those lists to a minimum. And do the same with the
 18 exhibits. We have too many exhibits here. They may be necessary, but I
 19 would hope that we would limit exhibits to the ones that the jury really needs
 20 to thoroughly decide the case and not flood them with paper that is not
 21 necessary.

22 (Dkt. 188 at 41:23-42:8).

23 The plaintiffs have done just the opposite. Rather than attempt to cull down the
 24 number of exhibits listed in the Pretrial Order, they are requesting summary admission of
 25 almost every document mentioned in the Pretrial Order. Further, several exhibits (including
 26 7, 13, 20, 26, 108 and 109) are the entire NovaLinq or loan files for certain plaintiffs. The
 plaintiffs have not even attempted to sort through these voluminous files and identify the
 particular documents that may have some relevance.

1 Some of the exhibits addressed in this motion might be relevant and admissible at trial.
2 However, requesting wholesale admission of scores of exhibits because some of them might
3 be admissible is not the proper way to establish admissibility. More importantly, admitting
4 into evidence a large number of documents without some careful consideration of the
5 necessity of those exhibits will not assist the jury's understanding of this case and in fact will
6 lead to jury confusion.

7
8 **C. THE PLAINTIFFS HAVE NOT MADE ANY ATTEMPT TO SHOW THE**
9 **RELEVANCE OF THESE EXHIBITS OR PROVIDE ANY FOUNDATION**
10 **FOR ADMISSIBILITY.**

11 The plaintiffs argue that many of the exhibits at issue are not hearsay for various
12 reasons. NovaStar does not necessarily agree. However, even if these exhibits otherwise are
13 admissible, the plaintiffs have not made any showing of relevance.

14 The plaintiffs' motion contains just three conclusory sentences regarding relevance,
15 which state nothing more than the exhibits contain elements of plaintiffs' anticipated proof at
16 trial. Something more is required for admissibility. The plaintiffs must actually show the
17 Court the foundation for admissibility and provide the specific reason that each exhibit is
18 material to its trial presentation.

19 For some of these exhibits, the plaintiffs may be able to provide a proper foundation
20 and may be able to demonstrate relevance. However, NovaStar should not be required to
21 perform a specific analysis of 102 exhibits when the plaintiffs have not made any effort to
22 demonstrate admissibility.

23
24 **III. CONCLUSION**

25 The plaintiffs' motion is untimely, and should not even be considered. However, even
26 if the motion deserved the Court's consideration, it should be denied. The plaintiffs have not
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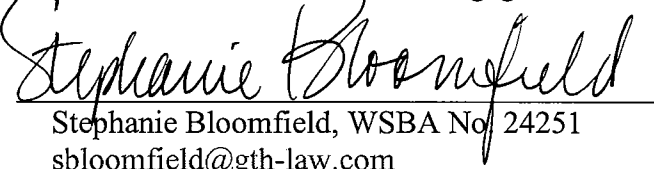
1 attempted to identify only those exhibits that really need to be presented to the jury and have
2 not attempted to establish the foundation and relevance of any of these exhibits. Allowing the
3 plaintiffs to engage in a wholesale dumping of exhibits into evidence would only lead to jury
4 confusion.

5 The proper time for ruling on the admissibility of these exhibits is during trial, after
6 the plaintiffs have established the foundation for admissibility of these exhibits and
7 demonstrated their relevance. Determining admissibility now without any effort by the
8 plaintiffs to provide a foundation or show relevance would be premature.

9
10 Dated this 4th day of June, 2007.

11 GORDON, THOMAS, HONEYWELL, MALANCA,
12 PETERSON & DAHEIM, LLP
13 Attorneys for Defendant NovaStar Mortgage

14 By:


Stephanie Bloomfield, WSBA No. 24251
sbloomfield@gth-law.com
1201 Pacific Avenue, Suite 2100
Tacoma, WA 98402
(253) 620-6500 (Telephone)

18 and

19 Mitchel H. Kider
20 Donald C. Brown, Jr.
21 WEINER BRODSKY SIDMAN KIDER, PC
22 1300 Nineteenth Street, N.W.
Washington DC 20036
(202) 628-2000 (Telephone)

APPENDIX

EX NO	DESCRIPTION	DOC. NUMBER	Stipulate to Admissibility	Dispute Admissibility	Stipulate to Authenticity	Dispute Authenticity
	GROUP 1					
1	Pierce – HUD-1, Settlement Summary	00940-942		X	X	
2	Pierce - Loan Approval Summary	001171		X	X	
3	Pierce - Lock-In Confirmation	00950, 00952, 00953		X	X	
4	Pierce – Adjustable Rate Note	0998-1000, 1027-1028	X		X	
5	Pierce – Good Faith Estimate, signed 8/12/03	NS 001252	X		X	
6	Pierce – PTF Conditions	NS 00987, 00997		X	X	
7	Pierce – NovaLinq Files	019680- 019690 019722- 019728 020033- 020092		X	X	
8	Kirby – HUD-1	NS 625- 626		X	X	
9	Kirby – Lock-In Confirmation	NS 636, 634		X	X	
10	Kirby – Adjustable Rate Note	NS 657- 659; 662, 628		X	X	
11	Kirby – Purchase Commitment	NS 789, 794		X	X	
12	Kirby – GFE, signed 8/6/03	NS 925	X		X	
13	Kirby – NovaLinq Files	019716- 019721 019691- 019693 021725- 021827		X	X	
14	Sherman – HUD-1	1736-1737		X	X	
15	Sherman – Lock in Confirmation	NS 1749		X	X	
16	Sherman – Adjustable Rate Note	NS 1774- 1776, 1779		X	X	
17	Sherman – GFE, signed 6/3/03	NS 2045	X		X	
18	Sherman – Loan Approval & Underwriting Summary	NS 1907 – 1909		X	X	
19	Sherman – Purchase Commitment	NS 1897		X	X	
20	Sherman – NovaLinq Files	019706- 019715 019770- 020032		X	X	

EX NO	DESCRIPTION	DOC. NUMBER	Stipulate to Admissibility	Dispute Admissibility	Stipulate to Authenticity	Dispute Authenticity
23	LePage – Lock in Conf	NS 0004		X	X	
26	LePage – NovaLinq Files	019694-019700 021828-021887		X	X	
44	Cugini File 03-058572	023036-023050		X	X	
94	Williams – loan file produced by NovaStar (05-560522)	71627-71639		X	X	
95	Eagletail – loan file produced by NovaStar (06-639083)	59519-59531		X	X	
96	Harris – loan file produced by NovaStar (04-041428)	37521-37538		X	X	
97	Howard – loan file produced by NovaStar (02-081312)	71392-71419		X	X	
98	Mayer – loan file produced by NovaStar (06-678195)	54220-54237		X	X	
101	Sherman TIL	NS 2042		X	X	
102	Pierce TIL	NS 1029		X	X	
103	Pierce Underwriting Summary	NS 1095		X	X	
104	Pierce Payoff Statement	NS 1269-1270		X	X	
105	Requests for Payoff Statements	NS 1271-1272		X		X
106	Pierce Payoff Statements and Loss Mitigation	NS 1301-1307		X	X	
108	Martinelli – Loan File					
109	Martinelli – NovaLinq			X	X	
111	Brown – Loan File					
112	Brown – NovaLinq files					
127	Hargin HUD-1	NS 68840-41		X	X	
128	Shafer GFE	NS 68934		X	X	
	GROUP 2					
32	Email from Jane Todd, dated 12/13/02 RE: YSP Disclosure in Compliance with RESPA (attaching 10/15/01 Memo)	71669-71671		X	X	
33	Course Overview: NovaStar's Commitment to Compliance	021927, 021965, 021969-71 021992		X	X	
35	NovaStar Warehouse Sales Kit 10/1/04	73013-73034		X	X	
36	Excerpt of New Hire Compliance Overview and Flow Chart	71842-43		X	X	

EX NO	DESCRIPTION	DOC. NUMBER	Stipulate to Admissibility	Dispute Admissibility	Stipulate to Authenticity	Dispute Authenticity
37	Email from Donna Cummings to Twila Fleming, June 21, 2005 re: YSP disclosure on GFE	73045		X	X	
38	NovaStar broker application disclosure	72006-72007		X	X	
39	Email from Mike Robar to Larry Scharff, Lance Anderson, copied to Becky Pilarz (5/3/04) re: Findings from WA exam for NMI	72531		X	X	
40	Email from Jonelle Knox to Donna Cummings, Michael Thomas, and copied to Larry Scharff (5/3/04) re: Memo – WA State Annual Assessment	72529		X	X	
41	Email from Larry Scharff to Paul Willis and Paul D'Agostino (7/22/04) re: YSP – states that require a \$ amount vs. a %	72642		X	X	
42	NovaStar test administered to account executives	72955, 72978		X	X	
55	Memo from Donna Cummings to Jaylene O'Brien, Racquel Evans, w/ cc to Larry Scharff, VP, Mike Robar, SVP re: WA State Annual Assessment Report	19642		X	X	
56	Memo listing Audit finding and progress in resolving issues, undated	19739-19741		X	X	
57	Email from Jane Todd to Julia Connelly and Angie Gardener re: WA audit issues, dated 11/7/02	19744		X	X	
58	Checklists for closing/auditing loan files	19908-19913		X	X	
59	Memo to Scott Hebdon; Steve Landes; Mike Page; Scott Haslock; JR Samsing; A Lowe; Ron Zaccaria; Dave Pazgan; John Pantalone; A. Gardiner; R. Jones, dated 11/11/02	19916-19921		X	X	
61	Excerpts from NovaStar's Account Executive Training Manual	Ex. 5 to Brown Dec. (Dkt. 27)		X	X	
75	Partnership selling instruction manual	19948-19960		X	X	

EX NO	DESCRIPTION	DOC. NUMBER	Stipulate to Admissibility	Dispute Admissibility	Stipulate to Authenticity	Dispute Authenticity
77	Compensation and commission schedule	19253-57		X	X	
78	Brokered loans Compensation schedule	19259		X	X	
79	NovaStar Financial, Inc. Corporate structure	19456-57		X	X	
80	Summary and overview of "Lender Disclosure Project" wherein Novalinq was modified to send a set of initial disclosures to borrowers	019966		X	X	
81	Management memo describing new initial disclosure process that will begin 6/6/06	19967		X	X	
85	NovaStar Compliance Manual (pp. 1, 11-17 – RESPA Compliance Checklist)	NS 72116, 72126-72132		X	X	
86	NovaStar Mortgage Inc., Orientation and Production Meeting, Underwriting Presentation (March 2002); Selected Slides: (1) Premium Pricing, (2) What Could Cause a Funding Delay	NS 72253, 72264, 72364		X	X	
87	E mail from Donna Cummings to Jaylene O'Brien, Racquel Evans, copied to Scharff, Robar, dated 8/23/04 re: WA State Annual Assessment Report	NS 72520		X	X	
88	E mail meeting notification; Subject: Dollar Amount Effects on YSP Inclusion; Attendees: Mitch Rupp, Larry Scharff, and Srinivas Vajhala	NS 72644		X	X	
129	Concerns by Origination LOC excerpt	NS 17767		X	X	
	GROUP 3					
30	NovaStar Rate Sheet (M Series, 9/8/2003)	10680		X	X	
31	NovaStar Rate Sheet (M Series, 9/8/2003)	10681		X	X	
45	Rate Sheets - FICO Enhanced Program	Ex. 1 to Brown Dec. (Dkt. 27)		X	X	
46	NovaStar Advertisement	18109		X	X	
47	NovaStar Advertisement	18801		X	X	
48	NovaStar Advertisement	18830		X	X	

EX NO	DESCRIPTION	DOC. NUMBER	Stipulate to Admissibility	Dispute Admissibility	Stipulate to Authenticity	Dispute Authenticity
49	NovaStar Advertisement – Wholesale	18856		X	X	
50	NovaStar Advertisement	18943		X	X	
54	Letter sent to borrowers from Ms. Cummings, NovaStar re: CLA and refund	19459		X	X	
65	NovaStar Advertisement	18093		X	X	
66	NovaStar Advertisements – IU (Internet Underwriter)	18159 - 18160		X	X	
67	NovaStar Advertisements – IU (Internet Underwriter)	18163		X	X	
68	NovaStar Advertisements – IU (Internet Underwriter)	18164		X	X	
69	NovaStar Advertisement – Wholesale	18517		X	X	
70	NovaStar Advertisement – NCI (NovaStar Capital Inc.)	18558		X	X	
71	NovaStar Advertisement – NCI (NovaStar Capital Inc.)	18559		X	X	
72	NovaStar Advertisement	18874		X	X	
73	NovaStar Advertisement – NCI (NovaStar Capital Inc.)	18898-18899		X	X	
107	ALT-A Program Rate Sheets	NS 10603-10604		X		X
110	M Series Wholesale Rate Sheet, effective 5/10/2005	NS 086664		X	X	
	GROUP 4					
76	Excel spreadsheet of loans made using an NCI line of credit	82887-82889		X	X	
89	NovaStar NMI Washington Loans (12/30/01-11/17/06)	NS 7699-7730		X	X	
90	NovaStar NHMI Loans	NS 21888-21898		X	X	
122	Class List (4-18-07) emailed by Emily Rugg to Tom Loeser on 4/27/07	NS 82893 - 83016		X	X	
123	Payoff Information with Closing/Funding Source	NS 73872.1 -73872.27		X	X	
124	WA Loans 2007 04 12 – additional 99 loans	NS 79512-79513		X	X	